

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

United States Court of Appeals
For the
District of Columbia Circuit

FILED FEB 9 1959

Joseph W. Stewart
CLERK

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 14883

WILLIAM J. ROBBINS,
Appellant

v.

GEORGE J. REED, CHAIRMAN
U.S. BOARD OF PAROLE, et al.,
Appellees

703

APPEAL FROM ORDER
DISMISSING COMPLAINT

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STATEMENT OF QUESTION PRESENTED

The question presented is whether a complaint for declaratory and injunctive relief will lie in the United States District Court for the District of Columbia to review the action of the United States Board of Parole in revoking appellant's parole. where (1) appellant was not given an opportunity to obtain counsel before the Board and (2) the revocation of appellant's parole constituted a gross abuse of discretion, was arbitrary and capricious and was, therefore, unlawful.

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UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

WILLIAM V. ROBBINS,	)	
Appellant,	)	
	)	
v.	)	Misc. No. 1130
	)	
GEORGE J. REED, Chairman, United States	)	
Board of Parole	)	
EVA BOWRING	)	Members, United
JOHN E. HENRY	)	States Board of
WILLIAM F. HOWLAND, JR.	)	Parole
GEORGE G. KILLINGER,	)	
Appellees.	)	

APPEAL FROM ORDER DISMISSING COMPLAINT

JURISDICTIONAL STATEMENT

The court below had jurisdiction under the Declaratory Judgment Act, 28 U.S.C. §2201 and Section 10 of the Administrative Procedure Act, 5 U.S.C. §1009. Such jurisdiction was supported in the Complaint and in the Memorandum in Opposition to Motion to Dismiss. This Court has jurisdiction of this appeal under 28 U.S.C. § 1291. Since the "jurisdiction" of the court below is in issue herein, a more full exposition of this question is presented in the argument, infra.

STATEMENT OF CASE

On March 17, 1958, appellant filed a complaint in the United States District Court for the District of Columbia against the appellees, members of the United States Board of Parole. The complaint was for declaratory and injunctive relief. On June 16, 1958, the appellees moved to dismiss the complaint on the grounds:

"(1) The complaint fails to state a claim upon which relief can be granted.

(2) The court lacks jurisdiction to grant the essential relief."

On July 30, 1958, the court below entered a judgment dismissing the complaint with the notation that it appeared:

"that this court lacks jurisdiction to grant the essential relief"

For purposes of the motion to dismiss below and for purposes of this appeal, the facts of this matter are stated in the complaint. These facts may be summarized as follows.

On or about April 27, 1955, appellant was arrested upon a warrant alleging that appellant had violated his parole. Plaintiff was returned to the U. S. Penitentiary at Atlanta on or about May 17, 1955. After a "hearing" before an examiner of the Board, which was held on or about May 31, 1955 the Board revoked appellant's parole. Since that time, appellant has been incarcerated in the Atlanta Penitentiary.

At the "hearing" the only persons present, besides the examiner, were the appellant, the chief parole officer of the penitentiary and a stenographer. The entire hearing consumed a very few minutes. Appellant was not given an opportunity to obtain counsel nor to present testimony or evidence in his behalf.

In the light of these facts, it is the contention of appellant on the merits that he was not given "an opportunity to appear" within the meaning of the parole statute, 18 U.S.C. § 4207. Therefore, the "hearing" which was held was invalid. In addition, it is the contention of appellant that the revocation of parole constituted a gross abuse of discretion and was arbitrary and capricious.

PERTINENT STATUTES

Parole Statute
18 U.S.C. § 4207

"Revocation upon retaking parolee

"A prisoner retaken upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board.

"The Board may then, or at any time in its discretion, revoke the order of parole and terminate such parole or modify the terms and conditions thereof.

"If such order of parole shall be revoked and the parole so terminated, the said prisoner

may be required to serve all or any part of the remainder of the term for which he was sentenced. June 25, 1948, c. 645, 62 Stat. 855."

Declaratory Judgment Act
28 U.S.C. §2201

"Creation of remedy

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964, amended May 24, 1949, c. 139, § 111, 63 Stat. 105."

Section 10 of Administrative Procedure Act
5 U.S.C. § 1009

"Judicial review of agency action

"Except so far as (1) statutes proclude judicial review or (2) agency action is by law committed to agency discretion.

Rights of review

(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Form and venue of proceedings

(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Acts reviewable

(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

Relief Pending review

(d) Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

Scope of review

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title, or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. June 11, 1946, c. 324, §10, 60 Stat. 243."

STATEMENT OF POINTS

1. The court below erred in dismissing the complaint on the ground that it was without power to grant the essential relief.
2. The court below erred in dismissing the complaint because an action for declaratory judgment and mandatory injunction will lie in that court to review the action of the United States Board of Parole upon a revocation of parole.

SUMMARY OF ARGUMENT

A. Appellant was deprived of his right to counsel and his right to present evidence at the "hearing" upon alleged violation of parole. The Board otherwise abused its discretion and acted contrary to law in revoking appellant's parole.

An action for declaratory judgment and injunctive relief will lie against the members of the Board, located in Washington, to review such action of the Board. Section 10 of the Administrative Procedure Act provides for such review and the Supreme Court has so held in an analagous line of cases.

B. The court below has the power to order the Board to effectuate appellant's release upon a review of the Board's action even though appellant himself is located outside the district. Even if the court could not order release, it is clear that a new hearing could be ordered. Therefore, the complaint properly stated a cause of action.

C. The complaint was not a petition for habeas corpus and was not intended to be such. Habeas corpus is not an exclusive remedy for review of Parole Board action. In an analagous line of cases, the Supreme Court has held that either a habeas corpus or a declaratory judgment proceeding is proper to review agency action.

ARGUMENT

A. An Action for Declaratory and Injunctive Relief Will Lie to Test the Validity of the Board of Parole upon Parole Revocation Proceedings.

The pertinent portion of the Parole Statute, 18 U.S.C. §4207, is quoted above. This statute provides that a prisoner retaken upon a warrant shall be given an opportunity to appear before the Board, a member thereof, or a designated examiner. This Court has held that a parolee, retaken upon a warrant, is entitled to an effective hearing, including the right to counsel. Moore v. Reid, 100 U.S. App. D.C. 375, 246 F. 2d 654 (1957). Appellant in this case was deprived of these rights.

It is clear that appellant is entitled to judicial review of the action of the board. Section 10 of the Administrative Procedure Act, quoted above, so provides. This is not a situation where the statute precludes judicial review nor a situation where the action is committed to agency discretion.^{1/} It is a statute where review has been permitted, Moore v. Reid, supra. And declaratory and injunctive relief is an appropriate method for reviewing agency action. Shaughnessy v. Pedreiro, 349 U. S. 48, 75 Sup. Ct. 591 (1955); Brownell v. We Shung, 352 U.S. 180, 77 Sup. Ct. 252 (1956).

B. The Apparent Basis for the Lower Court's Dismissal

The court below dismissed the complaint on the ground that it was without power to grant the essential relief. (JA 7) Literally construed, this would mean that the court did not believe it would have the power to order the appellees to effectuate the release of appellant even after it had been determined (1) that appellant had been denied the right to a hearing to which he was entitled by statute and (2) that the appellee had acted arbitrarily and capriciously in revoking appellant's parole.

It is submitted that this holding is incorrect on two grounds. First, it is believed clear that the court below would have the power to order the appellees, who are located within the district, to do whatever is necessary or appropriate to carry out its judgment. This would include, if necessary, ordering the release of the appellant. Secondly, assuming arguendo that the court would not have the power to order appellant's release, it does not follow that relief under the complaint could not be granted. The complaint asked in the first instance for a review of the Board's action; it asked in the second instance for a hearing before the court; it asked in the third instance for a mandatory injunction against the Board ordering the release of the appellant; and it asked finally for such other and further relief as may be appropriate (JA 3). Certainly, if it was within the power of the court to review the action of the Board and to grant any

^{1/} For an excellent discussion of the purpose and intent of Section 10 of the Administrative Procedure Act, see Judge Holtzoff's decision in Snyder v. Buck, 75 F. Supp. 902(1948), reversed on other grounds, 179 F. 2d 466.

relief to the appellant, including a proper hearing before the court or the Board, then there is no basis for dismissal merely because the ultimate hoped-for relief was without the power of the court. And this leads to what is believed to have been the real basis for dismissal.

C. Habeas Corpus is not an Exclusive Remedy for Review of Parole Board Action

The appellees below argued in essence that the complaint in this case was really a petition for habeas corpus, that habeas corpus is an exclusive remedy and that habeas corpus does not lie in the District of Columbia because the appellant is confined outside the territorial limits of the Court. It is admitted that, if the premises were correct, then the conclusion would be correct. However, the complaint was never intended to be a petition for habeas corpus and did not purport to be such. Furthermore, it is submitted that, even though habeas corpus may be an appropriate remedy in some instances to test the validity of actions of the Parole Board upon revocation of parole, see Moore v. Reid, supra, it is not an exclusive remedy. Section 10 of the Administrative Procedure Act, quoted supra, specifically provides that any appropriate remedy, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, may be brought to review administrative actions. And, in an analagous line of cases, the Supreme Court has held that deportation proceedings are judicially reviewable by way of declaratory order and injunctive relief proceedings as well as habeas corpus actions. Shaughnessy v. Pedreiro, 349 U.S. 48, 75 Sup. Ct. 591 (1955); Brownell v. We Shung, 352 U. S. 180, 77 Sup. Ct. 252 (1956). In Shaughnessy, the Government contended that the only method of reviewing deportation orders of the Attorney General was by habeas corpus. The Court rejected this contention and held that an action for declaratory order was also an appropriate remedy (as well as habeas corpus) in the light of Section 10

of the Administrative Procedure Act. And this holding was made in the face of a provision in the Immigration and Nationality Act of 1952 (8 U.S.C. §1252) that "the decision of the Attorney General shall be final". There is no such provision in the Parole Statute. The We Shung case concluded that "either remedy is available in seeking review of such orders" -- referring to habeas corpus and declaratory judgment proceedings.

CONCLUSION

For the above reasons, it is respectfully submitted that this court should reverse the order of dismissal of the lower court and decree that the complaint herein be reinstated.

Respectfully submitted,

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BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,883

WILLIAM J. ROBBINS, APPELLANT,

v.

GEORGE J. REED, CHAIRMAN, UNITED STATES BOARD OF
PAROLE, ET AL., APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

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United States Court of Appeals
For the
District of Columbia Circuit

FILED MAR 6 1959

Joseph W. Stewart

CLERK

No. 14,883

QUESTIONS PRESENTED

In the opinion of appellees the questions presented are:

1. Whether a prisoner, who is confined in the United States Penitentiary in Atlanta, Georgia, under an order revoking his parole, may bring an action for declaratory and injunctive relief in the District of Columbia to test the legality of his confinement pursuant to such revocation by the United States Board of Parole.

2. Whether the federal parole statutes require that a prisoner held on a parole violator's warrant must be afforded the opportunity to obtain counsel to represent him at a hearing in a federal penitentiary before an examiner of the Board of Parole concerning the revocation of his parole.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,883

WILLIAM J. ROBBINS, APPELLANT,

v.

GEORGE J. REED, CHAIRMAN, UNITED STATES BOARD OF
PAROLE, ET AL., APPELLEES

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA*

BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

Appellant was arrested on a parole violator's warrant (J.A. 2) and returned to the United States Penitentiary in Atlanta, Georgia on or about May 17, 1955 (J.A. 2). On May 31, 1955, the usual hearing was held by an examiner of the Board of Parole in the Atlanta Penitentiary to determine whether appellant had actually violated parole (J.A. 2). Subsequently, appellant's parole was revoked by the United States Board of Parole (J.A. 3). Appellant was at the time of the filing of this complaint and still is at the present time incarcerated in the Penitentiary in Atlanta (J.A. 2). On July 29, 1958, the United States District Court for the District of Columbia dismissed the complaint for lack of jurisdiction (J.A. 7). This appeal was taken.

STATUTES INVOLVED

The pertinent portions of the statutes involved in this case provide:

Act of June 11, 1946, c. 324, 60 Stat. 243, 5 U.S.C. 1009

Judicial review of agency action.—Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

* * * * *

Form and venue of proceedings.—(b) The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

Act of June 25, 1948, c. 645, 62 Stat. 855, 18 U.S.C. 4207

Revocation upon retaking parolee.—A prisoner retaken upon a warrant issued by the Board of Parole, shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board.

The Board may then, or at any time in its discretion, revoke the order of parole and terminate such parole or modify the terms and conditions thereof.

If such order of parole shall be revoked and the parole so terminated, the said prisoner may be required to serve all or any part of the remainder of the term for which he was sentenced.

SUMMARY OF ARGUMENT

Appellant, who is incarcerated in the United States Penitentiary in Atlanta, Georgia, has filed a complaint under the Administrative Procedure Act and the Declaratory Judgment Act against the members of the Board of Parole in the District Court below by which he seeks to test the validity of an order of the United States Board of Parole which revoked his parole.

Neither the Administrative Procedure Act nor the Declaratory Judgment Act creates a right of action in this type of situation. The Administrative Procedure Act specifically excepts from its review provisions, 5 U.S.C. 1009(b), administrative action which is committed to agency discretion. Parole—its granting or its revocation—is committed by law to the discretion of the Parole Board.

In any event, whether or not the Administrative procedure Act applies, it is clear from the decisions of this Court that the relief sought—declaratory and injunctive—cannot be used to obviate the territorial limitations inherent in a petition for a writ of habeas corpus. Appellant's custodial status determines the form of action which he must pursue to test the validity of the administrative order under which he is confined. Since appellant is in custody, any relief which the District Court might give would in effect entitle appellant to immediate release. The form of remedy by which release from confinement is sought is habeas corpus. Inasmuch as appellant is not within the territorial jurisdiction of the District Court below that Court had no jurisdiction to grant habeas corpus; only the District Court in Georgia has that power.

Assuming, *arguendo*, that the action was properly brought in the District of Columbia under the federal parole statute (18 U.S.C. 4207) there is no requirement that a parole violator be afforded an opportunity to obtain counsel to represent him at the revocation hearing. The instant case is distinguishable from decisions by this Court which have held such to be the requirement under the District of Columbia Code, for the statutes there construed

are significantly different from the federal statute, and the intent of Congress with respect to the federal statute was to keep the revocation hearing on an informal basis. It did not contemplate that counsel would be present at such hearing.

ARGUMENT

I

Relief From Detention Following Parole Revocation Is Not Available Under The Administrative Procedure Act

A. The Act Does Not Apply

Appellant contends that he is entitled to sue the Board of Parole under the Administrative Procedure Act, 5 U.S.C. 1009 (60 Stat. 243). In our view, the Act is not applicable to a parole revocation by the Board of Parole.

At the outset it should be noted that the Act specifically excepts from its provisions "agency action [which] is by law committed to agency discretion." This case comes directly within this exception, for the statutes governing parole commit revocation of parole to the Board's discretion. The pertinent parole statute (18 U.S.C. 4207, 62 Stat. 855) provides in part that "The Board *may* then [after a hearing], or at any time *in its discretion*, revoke the order of parole and terminate such parole or modify the terms and conditions thereof" (emphasis added). It further provides that "if such order of parole shall be revoked . . . the prisoner *may* be required to serve all or any part of [his] . . . sentence" (emphasis added). Clearly, revocation of parole is a matter which by statute is committed to the discretion of the Board of Parole and the determination of the Board is therefore not subject to judicial review under the Administrative Procedure Act. The decisions support this view. *Friedman v. Looney*, 210 F.2d 56 (C.A. 10); *Moore v. Reid*, 142 F. Supp. 481 (D.C. D.C.), *reversed on other grounds*, 100 U.S. App. D.C. 373, 246 F.2 654; *Jackson v. Humphrey*, 92 F. Supp. 635 (M. D. Pa.), *aff'd.*, 185 F.2d 407, *cert. denied*, 340 U.S. 937.

That is not to say that the decision of the Board to revoke parole is judicially unreviewable. Courts have

recognized on many occasions that when the Board of Parole acts without jurisdiction either in the sense that it did not act within the scope of its statutory authority or that it acted arbitrarily or capriciously, judicial review is available by way of a petition for a writ of habeas corpus. See *e.g.*, *Fleming v. Tate*, 81 U.S. App. D.C. 205, 156 F.2d 848; *Moore v. Reid*, 100 U.S. App. D.C. 373, 246 F.2d 654. But as concerns the Administrative Procedure Act, since the matter is committed to agency discretion, the Act by its very terms is not available to appellant in this case.

B. The Act Provides An Exclusive Remedy By Way of Habeas Corpus

In any event it is immaterial whether or not the Administrative Procedure Act applies, for even assuming, *arguendo*, that it does apply, appellant's argument must fail. For under the provisions of the Administrative Procedure Act itself, revocation of his parole could be tested only by a habeas corpus proceeding in the District in which the prisoner is confined.

Essentially, appellant contends that the present action for declaratory judgment and mandatory injunction is permissible in this case under the provisions of the Administrative Procedure Act because these remedies are referred to in section 10(b) of that Act, 5 U.S.C. 1009(b). That section provides that the proper mode of review is any special statutory review provided, or in the absence or inadequacy thereof, "any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction."

By the explicit terms of the Administrative Procedure Act the form of action pursued to test administrative determinations must be both "applicable" and brought in a court of competent jurisdiction.¹ Appellee here assumes, for the purpose of argument, that in a general sense review of appellant's parole revocation is contemplated by section 10(b). This, however, does not mean

¹ The title of section 10(b) is "Form and Venue of Proceedings."

that appellant may test the revocation by any of the forms of relief mentioned in the Act that he might choose. The Act requires that the form of relief be "applicable" and that it be brought in a court of competent jurisdiction. A reasonable construction of those requirements, in the light of traditional principles of law, indicates that of the three listed forms of action habeas corpus is the one—and the only one—which is "applicable" in this case.

In the District of Columbia habeas corpus has always been used to test the validity of parole revocation. *Fleming v. Tate*, *supra*; *Moore v. Reid*, *supra*. This is the remedy appellant must pursue.² This is not a mere matter of form, but it is a basic jurisdictional factor. For it is well settled that the territorial limitations inherent in a habeas corpus proceeding cannot be obviated by some other form of relief which seeks to accomplish the same purpose. *Taylor v. United States Board of Parole*, 90 U.S. App. D.C. 199, 194 F.2d 882; *Kaminer v. Clark*, 85 U.S. App. D.C. 205, 177 F.2d 51, *cert. denied* 333 U.S. 873.³

Appellant contends that he does not necessarily seek the same form of relief to which he might be entitled in a

² There are some decisions in other Circuits which suggest that an action would lie directly against the Parole Board. See *United States v. Nicholson*, 78 F. 2d 468 (C.A. 4); *United States v. Dillard*, 102 F.2d 94 (C.A. 4). One decision directly holds that the Parole Board must be made a party to test the validity of a revocation order. The Court indicated that the remedy, if any, must be had in the District of Columbia, *Howell v. Hiatt*, 199 F.2d 584 (C.A. 5). In the view of the Government, these decisions are in conflict with the rule prevailing in this Circuit and are in error. To inquire into any action of the Parole Board short of a jurisdictional defect would be an invasion of the Parole Board's discretion. On the other hand, where there is such a defect, the immediate release of the prisoner would be required. Relief of that sort must be by way of habeas corpus, with all its territorial limitations. See *Ahrens v. Clark*, 335 U.S. 188; *McAffee v. Clemmer*, 84 U.S. App. D.C. 57, 171 F. 2d 131, *cert. denied*, 337 U.S. 932.

³ It might be proper for this Court to consider appellant's petition as a petition for habeas corpus if he were confined in this District. Cf. *United States v. Carusi*, 166 F. 2d 457, 462 (C.A. 3), *vacated*, 168 F.2d 1014.

habeas corpus proceeding, i.e., release from custody. Yet he specifically prays for a mandatory injunction against the Parole Board compelling his release. This, of course, is equivalent to a request for relief by way of habeas corpus. Recognizing this difficulty, appellant argues that if he is not entitled to release he is entitled to a lesser form of relief, namely a review of the Board's action, a hearing before the Court, and any other appropriate relief. But the only effect of any of these prayers would be to decide whether or not appellant is legally held in custody. If the answer were in the negative, granting of relief would directly contravene the above-mentioned rule that the territorial limitations on habeas corpus cannot be obviated by some other form of relief. Appellant suggests that the courts should require the Parole Board to grant him a hearing in accordance with what appellant believes to be the requirement of 18 U.S.C. 4207 (62 Stat. 855), i.e., a hearing in which appellant would be represented by counsel (presumably the order would also require the Board not to act arbitrarily or capriciously). But appellant is now held in custody under the authority of the Board's order revoking appellant's parole. If the hearing which was held and the order revoking appellant's parole are fatally defective in any respect, appellant is now unlawfully in confinement, and he is entitled to be released. But there is no rule of law (certainly the statute does not so provide) which entitles appellant to a *second* hearing. He is either legally or illegally confined, and he must test the validity of such confinement (which is under the authority of the revocation order) by a habeas corpus proceeding in the proper District Court in Georgia.

Appellant relies on cases involving deportation and exclusion orders under the Immigration and Nationality Act to support the proposition that he may seek relief by any of the forms of action mentioned in the Administrative Procedure Act. These decisions fully support appellee's contention that the applicable form of relief under the Administrative Procedure Act (if it applies) is habeas

corpus when the complaining party is in custody. In the cases on which appellant relies, *Shaughnessy v. Pederiro*, 349 U.S. 48; *Brownell v. Tom We Shung*, 352 U.S. 180, the complaining party was *not* in custody. The issue in those cases was whether or not in the light of the Administrative Procedure Act an alien about to be deported or permanently excluded must submit himself to the custody of the Attorney General before any attack could be made on the deportation or exclusion order. In both cases it was held that declaratory relief coupled with an injunction was proper to test the order even though prior to the adoption of the Administrative Procedure Act,⁴ habeas corpus was the traditional mode of review. However, there is no indication that any method of review other than habeas corpus would have been proper had the complaining party been in custody. Indeed, the cases, if anything, support the view that the remedy of the complaining party depends upon his custodial status. If the party is not in custody, a declaratory judgment, if otherwise appropriate, is the proper remedy. If he is in custody, the validity of the order must be tested by habeas corpus. In *Tom We Shung*, *supra*, the Court made this clear (352 U.S. at 186):

It may be that habeas corpus is a far more expeditious remedy than that of declaratory judgment, as the experience of *Shung* may indicate. But that fact [time element] may be weighed by the alien against the necessity of arrest and detention after which [balancing of these two factors] he may make his choice of the form of action he wishes to use in challenging his exclusion (brackets supplied).

The element of custodial status was also present in the *Pederiro* case, *supra*. The Court of Appeals in that case, 213 F.2d 768, 769 (C.A. 2) stated:

⁴ Prior to the adoption of the Administrative Procedure Act, *Perkins v. Elg*, 69 U.S. App. D.C. 175, 99 F. 2d 408, *modified and aff'd*, 307 U.S. 325, held the Declaratory Judgment Act available to test the legality of a deportation order. The alien in that case, too, was not in custody.

The traditional remedy of habeas corpus as a means of reviewing the validity of an order of deportation is plainly inapplicable, as petitioner is not in custody, and one cannot blame him for unwillingness to gamble with his liberty which may not be readily regained.

This Court held in *Kaminer v. Clark*, 85 U.S. App. D.C. 205, 177 F.2d 51, *cert. denied* 338 U.S. 873, that an action for declaratory judgment seeking suspension of a deportation order would not lie in the District of Columbia.⁵ *Kaminer* was cited and approved in *Kristensen v. McGrath*, 86 U.S. App. D.C. 48, 179 F.2d 796, *aff'd.*, 340 U.S. 162. There, the Court held that a declaratory judgment and injunction proceeding would lie in the District of Columbia to test the validity of a deportation order outstanding against a naturalized citizen who was not in custody. The Court was careful to indicate, however, that the decision did not conflict with the *Kaminer* case, stating with respect to its earlier decision that (179 F. 2d at 800):

We ruled that 'An action for declaratory judgment cannot be substituted for habeas corpus so as to give jurisdiction to a district other than that in which the applicant is confined or restrained' . . . Here, declaratory relief is appropriate and since appellant is not in custody in another district the *Kaminer* rule is necessarily inapplicable.

These conclusions in the decisions are based upon the overriding consideration that if the rule were otherwise, the territorial limitations on the power of a court to issue a writ of habeas corpus would be wiped out by the Declaratory Judgment Act and the Administrative Procedure Act. Certainly Congress intended no such result.

The legislative history of the Administrative Procedure Act clearly supports this view. The Senate Judiciary

⁵ The Court "express[ed] no opinion . . . as to whether the appellant [was] entitled to a writ of habeas corpus or to a declaratory judgment." 177 F.2d at 52. But it held that declaratory judgment could not be substituted for habeas corpus in order to obtain jurisdiction in another District.

Committee reported that section 10(b) gave express statutory recognition to the so-called common law actions as being the appropriate and authorized means of judicial review to be operative when the special statutory forms of review were lacking or insufficient. But always in the legislative history of the Act reference to any particular form of review was limited to "proper case" or "relevant form of action."⁶

⁶ S. Rept. No. 752, Committee on the Judiciary—79th Cong., 1st Sess.—pp. 26-27.

* * *. (b) *Form and Venue of Action*. The technical form of proceeding for judicial review is any special proceeding provided by statute or, in the absence or inadequacy thereof, any relevant form of legal action (such as those for declaratory judgments or injunctions) in any court of competent jurisdiction. * * *.

The first sentence of this subsection is an express statutory recognition of the so-called common-law actions as being appropriate and authorized means of judicial review, operative whenever special forms of judicial review are lacking or insufficient. The declaratory judgment procedure, for example, may be operative before statutory forms of review are available; and in a proper case it may be utilized to determine the validity or application of agency action. The expression "special statutory review" means not only special review proceedings wholly created by statute, but so-called common-law forms referred to and adopted by statute as the appropriate mode of review. * * *

Representative Walter reporting to the House from the Committee stated (92 Cong. Rec. 5654):

Under this bill the technical form of proceeding for judicial review is, first, any special proceeding which Congress has provided or, in the absence or inadequacy thereof, any relevant form of action such as those for declaratory judgments or injunctions in any court of competent jurisdiction.

* * * * *

These provisions summarize the situation as it is now generally understood. The section does not disturb special proceedings which Congress has provided, nor does it disturb the venue arrangements under existing law. It does, however, constitute a statutory adaption of traditional forms of action in cases where Congress has made no contrary provision for judicial review.

Thus it is clear that Congress had no intention of eliminating the traditional methods of review or of substituting or adding new methods in cases like the instant one. It would be absurd to suppose that Congress intended that every parole violator, every conditional release violator, and every prisoner who wished to contest administrative computation of his sentence, of good time, etc., who is confined outside of the District of Columbia could test the validity of his detention in the District of Columbia courts under the Administrative Procedure Act by an action for a declaratory judgment and mandatory injunction. Such persons are remanded to their traditional mode of attack—habeas corpus—which is effective in every respect and which affords complete judicial review of administrative action.

Even aside from the jurisdiction limitation this case is not otherwise appropriate for a declaratory judgment. Appellant essentially claims that his detention is illegal because he was not afforded a "hearing" as he views that term should be construed under 18 U.S.C. 4207. However, as previously noted, appellant concedes that he had a hearing. He contends only that such hearing was procedurally not as complete as, in his view, it should have been. That kind of a defect does not give rise to the type of case envisioned by the Declaratory Judgment Act or by the Administrative Procedure Act (assuming *arguendo* that they are applicable). In *Kristensen v. McGrath*, *supra*, this Court indicated that the Declaratory Judgment Act was designed to be used to decide cases prior to the time that the law's coercive machinery is brought into play. 179 F.2d at 801. Accord, *Clark v. Memolo*, 85 U.S. App. D.C. 65, 174 F.2d 978, 981. It is apparent here that whatever machinery was necessary to revoke appellant's parole has already been brought into play. Appellant's parole was revoked in 1955, and he had been serving the unexpired portion of his original sentence over three years prior to the time he filed the instant action. Surely, nothing can be gained either by way of protecting the rights of this appellant or by expediting normal judicial review pro-

cedures by allowing appellant to bring an action in this District. Declaratory relief will not prevent any injury (if in fact there is injury), it will not effect the release of appellant, and, as previously pointed out, it cannot declare that appellant has the right to a second hearing. At most, declaratory relief which adjudicated the invalidity of the hearing which was held (assuming such would be the result) might be persuasive authority to a Federal court in Georgia in the event appellant sought a writ of habeas corpus to obtain his release. Obviously such relief is inappropriate.

The same reasons which preclude use of declaratory judgment in this action also preclude the entry of a mandatory injunction. This is true whether or not the relief requested is to compel the release of appellant or to compel the Board of Parole to hold a second hearing on the parole revocation.

This Court has specifically held that relief in the nature of a mandatory injunction cannot be substituted for a writ of habeas corpus. *E.g., Taylor v. United States Board of Parole*, 90 U.S. App. D.C. 199, 194 F.2d 882. Furthermore this Court in *McMurtrey v. Clark*, 81 U.S. App. D.C. 294, 157 F.2d 703, *cert. denied*, 329 U.S. 805, made it clear that neither mandamus nor mandatory injunction are appropriate remedies if any other effective remedy is available.⁷

It is clear that the *McMurtrey* case correctly states the rule. For such extraordinary remedies as a mandatory injunction (whether or not it be used in conjunction with a declaratory judgment) are not favored when other means, such as appeal, habeas corpus, etc., are available to test the legality of action of a particular official or agency. The granting and revocation of parole are by statute vested in the discretion of the Board of Parole. There is no requirement in the statute that the Board must parole a prisoner, or that the Board must revoke the

⁷ 157 F. 2d at 704: "To all of this may be added the rule that mandamus never lies except where there is no other remedy and here habeas corpus is still available."

prisoner's parole if the conditions of such parole have been violated, or that the prisoner be given two opportunities to appear before an examiner. It is a matter of discretion with the Board. In the instant case a mandatory injunction would require the Board to hold another hearing on the revocation of appellant's parole. The District Court should not require the Board of Parole to act in this manner for it would then in substance require the Board to initiate *de novo* the process of revoking appellant's parole—a matter within its discretion. Furthermore appellees—the Board of Parole—do not desire to initiate parole revocation proceedings again, but prefer to stand on the hearing and the revocation order as they now exist. If the Board was in error, habeas corpus is available to correct that error. But the discretion of the Board cannot be controlled by a suit for mandatory injunction. See *Clackamas County v. McKay*, 94 U.S. App. D.C. 108, 219 F.2d 479, *vacated with instructions to dismiss as moot*, 349 U.S. 909.

In sum, it is clear that whether or not the Administrative Procedure Act has any application to the instant case, the remedies which appellant seeks cannot effectively be given by the courts in the District of Columbia. Accordingly, the District Court properly dismissed the cause on the ground that it lacked jurisdiction to grant the essential relief.

II

The Parole Statutes Do Not Require That A Parole Violator Be Represented By Counsel At The Revocation Hearing

In the event that this Court decides that this action will lie in the District of Columbia the question arises as to the right of appellant under the statute (18 U.S.C. 4207) to have counsel represent him at the hearing before the examiner. While the specific matter before this Court is the jurisdictional issue,⁸ since appellant argues in his

⁸ The District Court did not rule on the question of appellant's right to be represented by counsel, but rather dismissed the complaint for want of jurisdiction (J.A. 7).

brief that he is entitled to counsel it is deemed appropriate to point out appellees' position in this matter.

Appellees recognize that this Court has held that under the old District of Columbia parole statute (24 D. C. Code 206) the language—"he shall be given an opportunity to appear before said Board"—meant that a parole violator had the right to be represented by counsel in his appearance before the Board. *Fleming v. Tate*, 81 U.S. App. D. C. 205, 156 F. 2d 848. This holding was subsequently codified in the District of Columbia Code, 61 Stat. 379, 24 D. C. Code 206.⁹ The *Fleming* case was, of course, decided under the District of Columbia statute. It is the Government's position that its holding is inapplicable to the Federal statute and to the instant case.

Although the statute involved in *Fleming* was similar to a previous Federal statute¹⁰ there are significant and fundamental differences between the old District of Columbia statute and the present Federal Act. The District statute specifically stated that the parole violator was to be given an opportunity to appear before the Board. In this context the formality of such a statement may well have justified the conclusion that a formal hearing before the Board with counsel was contemplated by Congress. However, the present Federal statute (18 U.S.C. 4207, 62 Stat. 855) indicates a Congressional intent that the hearings under that Act are to be completely informal in nature, for it states that the opportunity to appear is before the Board, or a member thereof, or an examiner designated

⁹ "He shall be given an opportunity to appear before the Board, a member thereof, or an examiner designated by the Board. At such hearing he may be represented by counsel." This Court held in *Moore v. Reid*, 100 U.S. App. D.C. 373, 246 F.2d 654, that a parole violator did not waive this right to counsel under the new statute when he was not informed of the existence of such right.

¹⁰ 36 Stat. 820 (1910), 18 U.S.C. 719:

"At the next meeting of the board of parole held at such prison . . . he shall be given an opportunity to appear before said board of parole . . ."

by the Board.¹¹ This distinction between the District statute involved in *Fleming* and the Federal statute was recognized in *Hiatt v. Compagna*, 178 F. 2d 42 (C.A. 5), affirmed by an equally divided Court, 340 U.S. 880. The Court distinguished the *Fleming* case in these terms (178 F. 2d at 46):

Congress in revising the parole law, Revised Title 18, Sec. 4207, changed the wording to read: 'A prisoner retaken upon a warrant issued by the Board of Parole shall be given an opportunity to appear before the Board, a member thereof or an examiner designated by the Board.' This change cuts deeply into the idea that the appearance is to be a trial. An examiner may conduct it now, and it would seem that the taking of the testimony of the prisoner, and perhaps his witnesses, is alone contemplated.

The conclusion that unlike the District of Columbia statute the Federal statute does not contemplate counsel at a hearing before the Board or an examiner is inferentially supported by Congressional sanction of the District of Columbia law. In the area of parole Congress has in fact treated the two categories of prisoners differently.¹² In 1947, as previously noted, Congress codified the *Fleming*

¹¹ Both the Senate and House Reports indicate that the change in the statute—to allow the hearing to be before an examiner or single member of the Board was made in the interest of administrative efficiency and economy. H. Rept. No. 1606, Committee on the Judiciary, 76th Cong., 3rd Sess., p. 2; S. Rept. No. 1854, Committee on the Judiciary, 76th Cong., 3rd Sess., printed in 86 Cong. Rec., p. 8958.

¹² 18 U.S.C. 4202, 62 Stat. 854, establishes as the minimum term to be served in order to be eligible for parole one-third of the prison term imposed, whereas in the District of Columbia a prisoner under the indeterminate sentence statute need serve only the minimum sentence imposed which cannot be more than one-third of the maximum but which can be less. 54 Stat. 264, 24 D.C. Code 203. Similarly, unlike the Federal parole statute, the Parole Board in the District of Columbia on its own initiative can apply to the Court to reduce a prisoner's minimum sentence. 61 Stat. 379, 24 D.C. Code 201(c).

rule in the District of Columbia statute. In the House Report on this statute a letter from the Board of Commissioners of the District of Columbia to the House Committee which was made part of the House Report specifically referred to the *Fleming* case. H. Rept. No. 451, Committee on the District of Columbia, 80th Cong., 1st Sess., p. 6. Congress was aware of the construction placed upon the District statute in *Fleming*. Presumably, the intent was to clarify the law announced in that decision. However, Congress did not see fit to amend the Federal statute in that way, or for that matter, in any way. The clarification made in the District statute was presumably deemed necessary to afford parole violators effectively the right of counsel at a revocation hearing; otherwise Congress did a useless thing. The failure of Congress to make similar provision giving a right of counsel under the Federal statute can only be deemed to indicate an intention to provide different procedures for parole violators subject to the Federal statute. Congressional intent with respect to the Federal statute, particularly in view of the fact the statute contemplates an informal hearing, must have been therefore to give parole violators no *right* to have counsel at a revocation hearing.¹³ Moreover, Congress must have been aware of the fact that the administrative practice for nearly fifty years (since 1910) has been not to provide counsel at revocation hearings.

The whole concept of representation by counsel is foreign to the policy and purpose of a revocation hearing.¹⁴ A revocation hearing is not so much concerned with facts

¹³ Of course, there is no constitutional issue involved with respect to the right of counsel. For parole is a matter of legislative grace. This Court in the *Fleming* case specifically recognized that any right to counsel was statutory and not constitutional.

¹⁴ It might not be amiss to note that there no provision is made in the statute and the Board has no power or funds to provide counsel to represent a parole violator at the hearing. Consequently only those with means could take advantage of this privilege, should this Court so construe the statute. This might well raise a constitutional question. Cf. *Griffin v. Illinois*, 351 U.S. 12.

that might be admissible in a court proceeding¹⁵ or facts which might be proper under broader rules of evidence in an administrative proceeding; nor is such hearing concerned merely with violations of state or federal criminal statutes. It is concerned with parole violation—terms and conditions of parole set by the Board. The Board is interested in the attitude and demeanor of the parolee in relation to the terms and conditions which the Board has set for the particular prisoner. Indeed under the statute the Board has power merely to modify the conditions of parole rather than revoke it altogether. In other words the issue at the hearing is whether the parolee, in the Board's judgment is still a good parole risk; if so should the conditions of parole be modified, if not should parole be revoked. To achieve the purpose of the statute, flexibility is required, and the Board, or the examining member, must be placed *vis à vis* the parolee, not *vis à vis* the parolee's lawyer.

CONCLUSION

Accordingly, it is respectfully submitted that the decision of the lower Court be affirmed.

W. WILSON WHITE,
Assistant Attorney General.

OLIVER GASCH,
United States Attorney.

HAROLD H. GREENE,
D. ROBERT OWEN,
Attorneys,
Department of Justice.

¹⁵ It should also be noted that the Parole Board has no subpoena power to require that direct evidence from other witnesses be adduced.

United States Court of Appeals
For the
District of Columbia Circuit

FILED FEB 9 1959

Joseph W. Stewart
CLERK

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 14883

WILLIAM J. ROBBINS,
Appellant

GEORGE J. REED, CHAIRMAN
U. S. BOARD OF PAROLE, et al.,
Appellees

JOINT APPENDIX

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UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

CASE CLOSED

Date	Proceedings	Fees	Total
1958	Deposit for cost by		
Mar. 17	Complaint, appearance U. S. Atty. ser. 3-17-58; Atty. Gen. ser. 3-25-58 filed		
Mar 17	Summons, copies (5) and copies (5) of Complaint issued #1 ser. 3-18-58		
May 15	Motion of defts for extension of time to answer complt; App. Oliver Gasch, Ed. P. Troxell; E. Rily Casey, Thomas H. McGrail; c/m 5-15-58 P & A; M. C. 5-15-58.		
May 20	Answer of plttf. in opposition to motion for extension of time c/m 5-20-58 filed		
June 5	Order extending defts. time to answer complt. to and including 6-16-58 (N) Morris, J.		
June 16	Motion of defts. to dismiss; c/m 6-16-58; P&A; appearance of George Cochran Doub, Donald B. MacGuineas & Dennis C. Cronin of the Dept. of Justice and Thomas H. McGrail, U. S. Atty.; M. C. filed.		
June 24	Stipulation extending time to July 3, 1958 to file opposing points and authorities to motion to dismiss. filed.		
Jul. 3	Stipulation extending time for plttf to file opposing P & A no later than 7-11-58; filed.		
July 11	Opposition of plttf. to motion to dismiss; c/m 7-11-58. filed.		
July 30	Order dismissing the complt. (signed 7-29-58) (N) Keech, J.		
Sep. 16	Application of plttf. for leave to appeal without prepayment of costs; affidavit filed.		
Sept. 17	Leave to proceed to appeal without prepayment of costs denied. (N) (fiat) Keech, J.		
Nov. 28	Certified copy of order of U. S. C. A. for D. C. allowing petitioner to appeal without prepayment of costs and further that original record be transmitted by Clerk, District Court within 40 days.		

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM V. ROBBINS,
Plaintiff

v.

GEORGE J. REED, Chairman, United States
Board of Parole

EVA BCWRING) Members, United
JOHN E. HENRY) States Board of Parole
WILLIAM F. HOWLAND, JR.)
GEORGE G. KILLINGER)

) CIVIL AC-
) TICN NC.
) 703-53
)

COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF

1. This is an action for declaratory judgment under the Declaratory Judgment Act (28 U.S.C. §2201) and for injunctive relief.

2. The plaintiff, William V. Robbins, is being held in the United States Penitentiary at Atlanta, Georgia upon order of the United States Board of Parole (hereinafter referred to as Board) issued on or about May 31, 1955.

3. The above-named defendant Reed is Chairman of the Board and the other above-named defendants are members of the Board. The Board is located in the H. O. L. C. Building, 101 Indiana Ave., N. W., Washington, D. C.

4. On or about November 21, 1950, plaintiff was released on parole from the United States Penitentiary, Atlanta, Georgia.

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5. On or about April 27, 1955, plaintiff was arrested upon a warrant alleging that plaintiff had violated his parole; plaintiff was subsequently returned to the United States Penitentiary, Atlanta, Georgia, on or about May 17, 1955.

6. On or about May 31, 1955, plaintiff was brought before an examiner of the Board at the Penitentiary and a "hearing" was held to determine whether plaintiff's parole should be revoked.

7. The entire "hearing" consumed a very few minutes. At the "hearing", which was held in the Penitentiary, the only persons present were the Board's Examiner, the chief parole officer of the penitentiary, a stenographer and the Plaintiff.

8. Plaintiff was not given an opportunity to obtain counsel for the purpose of said "hearing", now was plaintiff given an opportunity to present testimony and evidence in his behalf. Consequently, plaintiff was not given "an opportunity to appear" as required by statute. 18 U.S.C.A. §4207.

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9. Subsequent to the "hearing", Plaintiff's parole was revoked by the Board without a statement of the reasons therefor, and Plaintiff has been held since that time in the Penitentiary.

10. Plaintiff will show to this court through competent evidence that, even if a proper hearing were held before the Board, the revocation of Plaintiff's parole constituted a gross abuse of discretion, was arbitrary and capricious and was, therefore, unlawful. Plaintiff will show that the reason why he left the Northern District of Alabama was because of the unconscionable and improper coercion practiced on plaintiff by his probation officer wherein plaintiff was required, under great mental and physical stress, to dwell under the same roof with his estranged wife. Further, plaintiff was specifically precluded,

3

by said probation officer, from accepting better employment within the Northern District of Alabama because of the refusal of his estranged wife to leave the City of Cullman, Alabama.

11. Plaintiff will further show to this court that, at all times while he was on parole, plaintiff conducted himself as a law-abiding self-supporting and respectable citizen.

WHEREFORE, Plaintiff respectfully prays that the Court:

(1) Review the "hearing" and action of the Board in the above matter; and

(2) Declare such "hearing" and action to be invalid; and

(3) After a proper hearing before this Court, issue a mandatory injunction against said Board ordering that plaintiff be forthwith released from the United States Penitentiary, Atlanta, Georgia and restored to freedom; and

(4) For such other and further relief as may be proper and appropriate.

/s/ THOMAS F. RYAN, JR.

THOMAS F. RYAN, JR.

Attorney for Plaintiff

Bowen Building

Washington 5, D. C.

Filed June 16, 1958

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM V. ROBBINS,)
Plaintiff,)

v.)

GERGE J. REED, Chairman)
United States Board of)
Parole, et al.,)

Defendants.

CIVIL ACTION NO. 703-58

MOTION TO DISMISS

Comes now the defendant by his attorney, the United States Attorney, and respectfully moves the court to dismiss the complaint herein on the

(3)

grounds:

1. The complaint fails to state a claim upon which relief can be granted.
2. The court lacks jurisdiction to grant the essential relief.

and for the reasons more fully set forth in the attached memorandum of points and authorities.

/s/ GEORGE COCHRAN DCUB
GEORGE COCHRAN DCUB
Assistant Attorney General

/s/ DONALD B. MACGUINEAS
DONALD B. MACGUINEAS
Attorney, Department of Justice

/s/ DENNIS C. CRCNIN
DENNIS C. CRCNIN
Attorney, Department of Justice

/s/ THOMAS H. MCGRAIL
THOMAS H. MCGRAIL
Assistant United States Attorney

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing Motion to Dismiss together with Memorandum of Points and Authorities in Support thereof has been made upon plaintiff by mailing a copy to his attorney, Thomas F. Ryan, Jr., Esq., Bowen Building, Washington 5, D. C., this 16th day of June, 1953.

/s/ THOMAS H. MCGRAIL
THOMAS H. MCGRAIL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM V. ROBBINS,)
Plaintiff,)
v.)
GEORGE J. REED, Chairman)
United States Board of)
Parole, et al.,)
Defendants.)

CIVIL ACTION NO. 703-58

MEMORANDUM OF POINTS AND AUTHORITIES IN
SUPPORT OF MOTION TO DISMISS

Facts

Plaintiff brings this action against the members of the United States Board of Parole under the Declaratory Judgment Act for a "mandatory

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injunction against said Board ordering that plaintiff be forthwith released from the United States Penitentiary Atlanta, Georgia and restored to freedom." (Complaint, Para. 11).

Plaintiff alleges that on or about April 27, 1955 he was arrested upon a warrant charging him with violation of parole and that subsequently he was returned to the United States Penitentiary at Atlanta, Georgia. (Complaint, Para. 5). Plaintiff further alleges that he was not given "an opportunity to appear" as required by 18 U.S.C. §4207 and that "the revocation of plaintiff's parole constituted a gross abuse of discretion, was arbitrary and capricious and was therefore unlawful." (Complaint, Paras. 8 and 10 resp.)

Argument

Defendant submits that the complaint should be dismissed for the following reasons:

2

1. The complaint fails to state a claim upon which relief can be granted.
2. The court lacks jurisdiction to grant the essential relief.

I

The court lacks jurisdiction to grant the
essential relief

The gravamen of plaintiff's complaint is that he is illegally detained in federal prison at Atlanta, Georgia because of the invalid revocation of his parole. Plaintiff prays that this Court issue a mandatory injunction ordering that plaintiff be restored to freedom. The essential relief requested is habeas corpus.

Defendant submits that the United States District Court for the District of Columbia lacks jurisdiction to order the release of the plaintiff who is confined outside the territorial jurisdiction of this court. Ahrens v. Clark, 335 U. S. 188; McAffee v. Clemmer, 84 U.S. App. D.C. 57, 171 F. 2d 131, cert. den. 337 U.S. 932; Taylor v. United States Board of Parole, 90 U. S. App. D.C. 199, 194 F. 2d 882.

II

The complaint fails to state a claim
upon which relief can be granted

Plaintiff's remedy for his illegal detention is a petition for habeas corpus in the judicial district where he is confined.

The Court of Appeals for the District of Columbia has held that the remedy for the invalid revocation of parole is a petition for habeas corpus. Fleming v. Tate, 81 U.S. App. D.C. 205, 156 F. 2d 848; Moore v. Reid, 100 U.S. App. D.C. 375, 246 F. 2d 654. In short, where a parole is illegally revoked the resulting confinement is without authority of law and habeas corpus lies.

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However, in both the Fleming and Moore cases the petitioners were within the territorial jurisdiction of this court and therefore subject to its jurisdiction. The contrary is the fact in the instant case and the present defendant does not have actual or constructive custody of the plaintiff.

Assuming, for the purposes of this motion, that the instant plaintiff's parole has been unlawfully revoked his remedy is a petition for habeas corpus. However, such relief is available to the plaintiff only in the judicial district where he is confined. Ahrens v. Clark, supra, McAfee v. Clemmer, supra; Taylor v. United States Board of Parole, supra.

Plaintiff's selection of a different form of action does not enlarge the jurisdiction of this court. It is well settled that: "Where the writ of habeas corpus must fall because of jurisdictional limitation, no other writ can operate in its stead and to accomplish the same purpose." Phillips v. Hiatt, 83 F. Supp. 935, 939. Taylor v. United States Board of Parole, supra; McMurtrey v. Clark, 81 U. S. App. D. C. 294, 157 F. 2d 703, cert. den. 329 U. S. 805; Clark v. Memolo, 85 U. S. App. D. C. 65; 174 F. 2d 978.

In the McMurtrey case, plaintiff, as here, sued under the Declaratory Judgment Act 1/ and prayed for a mandatory injunction restraining further execution of his commitment and requiring the Attorney General to order plaintiff discharged from custody. The government's motion to dismiss the complaint was granted and on appeal it was held:

1/ It is well settled, of course, that the Declaratory Judgment Act does not confer nor extend jurisdiction over an area not already covered, nor can it be used to give relief indirectly which cannot be given directly. It does not enlarge the jurisdiction of the District Courts. Clark v. Memolo, 85 U.S. App. D. C. 65, 174 F. 2d 978; Di Benedetto v. Morgenthau, 80 U.S. App. D. C. 34, 148 F. 2d 223, cert. den. 326 U. S. 686; Almour v. Pace, 90 U. S. App. D. C. 63, 65, 193 F. 2d 699, 701.

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"Under the federal statutes the Attorney General is made the conduit through which the sentence of a federal court in a criminal case is carried into effect. His duty is to designate the place of confinement, and that duty appears to have been fully discharged. Appellant's liberty is now restrained on the judgment and sentence of a court of competent jurisdiction and it is well established that neither mandamus nor mandatory injunction may be invoked to review judicial decision."

"To all of this may be added the rule that mandamus never lies except where there is no other remedy and here habeas corpus is still available."

The rule was similarly stated in Taylor, supra, as follows:

"In 11109 complainant seeks by mandamus to obtain his transfer from the Medical Center at Springfield to an ordinary penal institution upon the ground that he was illegally transferred to the Center and is now illegally detained there. Mandamus will not lie. It cannot be used as a substitute for habeas corpus. (citations omitted) Nor will habeas corpus lie in the District of Columbia, for the complainant is not confined within the territorial jurisdiction of its courts. (citations omitted)."

(6)

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In short, plaintiff may not substitute an action for mandatory injunction and declaratory relief for the traditional and exclusive remedy to test an illegal confinement. Moreover, suit against the superior officer does not cure the lack of jurisdiction over the subordinate custodian and his prisoner who are located without the territorial jurisdiction of the court. Ahrens v. Clark, supra; Sanders v. Bennett, 30 U. S. App. D. C. 32, 148 F. 2d 19.

On reasoning and authority the complaint should be dismissed for lack of jurisdiction. To hold otherwise would be to transform this court into the primary adjudicator of all federal custody matters regardless of where the detention occurs.

CONCLUSION

For the foregoing reasons it is respectfully requested

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that the complaint be dismissed with prejudice and costs be assessed against the plaintiff.

/s/ George C. Doub
GEORGE COCHRAN DOUB
Assistant Attorney General

/s/ D. B. MacGuineas
DONALD B. MACGUINEAS
Attorney, Department of Justice

/s/ Dennis C. Cronin
~~DENNIS COCHRAN~~ ~~of Justice~~
Attorney, Department of Justice

/s/ Thomas H. McGrail
THOMAS H. MCGRAIL
Assistant United States Attorney

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

WILLIAM V. ROBBINS :
Plaintiff :

v. :

Civil Action No. 703-58

GEORGE J. REED, Chairman :
United States Board of Parole, :
et al. :

C R D: E R

This matter having come before the Court on the Motion of defendant to dismiss and on the Opposition of plaintiff thereto, and oral argument of counsel for the plaintiff and counsel for the defendant having been heard, and it appearing that this court lacks jurisdiction to grant the essential relief requested in the complaint, it is this 29th day of July, 1958,

(7)

ORDERED that the Motion of defendant to dismiss is granted and the complaint herein is dismissed.

/s/ R. B. Keech
J U D G E

Certificate of Service

I hereby certify that service of the foregoing Order was made upon plaintiff by mailing a copy thereof to his attorney, Thomas F. Ryan, Jr., Esquire, 821 - 15th Street, N. W., Washington 5, D. C., this 24th day of July, 1958.

/s/ Thomas H. McGrail
THOMAS H. McGRAIL
Assistant United States Attorney

Filed June 16, 1958

UNITED STATES COURT OF APPEALS
for the

DISTRICT OF COLUMBIA CIRCUIT

No. Misc. 1130

William V. Robbins, Petitioner,

v.

George J. Reed, Chairman, U. S.
Board of Parole, et al.,
Respondents.

September Term, 1958
District Court
Civil Action 703-58

Before: Prettyman, Chief Judge, Fahy and Washington, Circuit
Judges, in Chambers.

ORDER

Upon consideration of the petition for leave to prosecute an appeal in forma pauperis, of respondents' opposition, and of petitioner's reply, it is

ORDERED by the court that petitioner is allowed to appeal without prepayment of costs from the judgment of the District Court.

It is FURTHER ORDERED by the court that the original record shall be prepared as the record on appeal in this case and transmitted to this court by the clerk of the District Court within forty days.

Per Curiam.

Dated: November 25, 1958

